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511785—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 973

DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 25–36) is reported at 264 F. 2d 642. The decision of the National Labor Relations Board (R. 70–88)[1] is reported at 118 NLRB 1251.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1959 (Pet. 57–59). The petition for a writ of certiorari was filed on June 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References to the "Transcript of Record" filed in the Court of Appeals are designated as "R." References to the Appendix to the Board's brief filed in the Court of Appeals are designated as "B.A."

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board could reasonably draw the inference that petitioner Union, in picketing at entrances to retail stores used by employees as well as the public, intended, at least in part, to reach the employees and, in violation of Section 8(b)(4)(A) of the Act, induce them to engage in work stoppages or refusals to perform services in the course of their employment with an object of forcing a cessation of business between the stores and another employer involved in a labor dispute with the Union.

2. Whether the Board properly found that the relationship in the instant case between a wholesale grocery concern, involved in a labor dispute with the Union, and retail grocery stores that own all of the stock of the former but do not exercise direct or immediate control over its operations, does not constitute them a single employer for purposes of Section 8(b)(4)(A) so as to entitle the Union to institute picketing at the stores which would otherwise be violative of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix E of the petition (Pet. 63).

STATEMENT

Associated Wholesale Grocery of Dallas, Inc. (Associated), a Texas corporation with its principal office and warehouse located in Dallas, is engaged in the wholesale purchase and resale of groceries and

related products (R. 94). The shares of stock issued by Associated are owned by approximately 370 retail grocery stores (R. 95). Under Associated's bylaws, its stockholders, each of which is entitled to one vote, annually elect nine directors who are vested with "complete control and management of the affairs of the Corporation" (R. 95). The directors have the power to accept or reject applications for stock ownership which is confined to "bona fide food dealers of established reputation for ethical business dealings." The directors are also empowered to revoke sales of stock to purchasers found to be ineligible "for any cause whatsoever" (B.A. 102–104).

Associated sells its merchandise only to its stockholder-stores which, however, do not make all their purchases from Associated (R. 95, 105). Since the latter does not carry all types of merchandise, it can supply at most about 31 percent of the needs of its stockholder-stores (R. 105; B.A. 28). Associated sells its merchandise at cost plus operating expenses (R. 95). All earnings in excess of such expenses are returnable as patronage dividends to stockholders in the ratio of their purchases (R. 25).[2]

On August 27, 1956, petitioner, the certified bargaining representative of the employees of Associated, called a strike of such employees in furtherance of a dispute respecting wages, hours, and other conditions of employment, and began picketing Associated's warehouse (R. 96–97). On the same day,

[2] Simril, Associated's general manager, testified that Associated is not chartered as a cooperative Association under the laws of Texas (R. 103; 76).

Associated sent a letter to its stockholder-stores expressing regret at its failure to deliver merchandise on time because of the strike, and soliciting help in loading or driving trucks until Associated could obtain replacements for the strikers (R. 97). In response, ten of Associated's 370 stockholder-stores volunteered limited assistance during the ensuing week. Eight stores supplied one employee each, and two stores supplied two and three employees, respectively. The total number of hours worked by these employees for Associated ranged from four hours to a maximum of 45½ hours. None of the retail stores supplied any employees to Associated after the first week (R. 98).

Petitioner also solicited the support of the stockholders of Associated by requesting that they refrain from assisting Associated, and urging that they purchase their groceries "elsewhere" until the dispute was settled (R. 98; B.A. 85–88). Sometime thereafter, but before October 26, petitioner on four or five occasions distributed handbills at the entrances to the retail stores of a number of Associated's stockholders and in automobiles near such stores. These handbills stated petitioner's position in its dispute with Associated, and requested recipients of the handbills to support the strike and to patronize other retail stores (R. 99–100). In addition, on October 10, petitioner published in a Dallas newspaper an advertisement which likewise stated petitioner's position and requested support of its strike (R. 99).

For the first two months, petitioner limited its strike efforts to a picket line at Associated and to

written or printed appeals for support of its strike. Beginning October 26, however, and at various times thereafter, petitioner picketed ten retail stores operated by stockholders of Associated (R. 101). The picketing took place at the front entrances of the stores which were used in common by customers, store employees, and employees of other employers supplying merchandise to the stores (R. 101–102). In the case of one of the retailers, Cliff Food Stores, picketing also occurred at the driveway to the parking lot which was used for deliveries to the back door of the establishment as well as by store customers (R. 102). Only four of the picketed stores had given assistance to Associated during the first week of the strike (R. 98).

Eight of the ten stores were picketed during the period from October 26 until November 17, the date on which the Board instituted a proceeding in a federal district court to enjoin such picketing activities (R. 101). On November 17, 1956, the two other stores were picketed, and on November 19, 1956, one of these was picketed (R. 101). The pickets carried placards which purported to be a notice to the public, stating that the employees of Associated were on strike and that the picketed store was unfair and inviting the public not to purchase merchandise obtained by the store from Associated.[1] The union also distributed handbills to the public in the vicinity of the stores

[1] The placards are reproduced in full in the opinion of the court below (Pet. 27–29).

appealing for support and urging that other stores be patronized (R. 99–101).

The Board dismissed the complaint insofar as it alleged that the distribution of the handbills to the public was violative of Section 8(b)(4)(A) of the Act (R. 75–76). The Board, one member dissenting, concluded, however, that picketing the retail stores entrances and driveways customarily used by store employees and employees of some suppliers for the purpose of forcing the store owners to cease doing business with Associated, constituted inducement of employees within the prohibition of Section 8(b)(4)(A) (R. 75). Noting the fact that petitioner did not resort to such picketing until after its appeal to consumers through distribution of handbills and a newspaper advertisement had proved ineffective, and that store employees and employees of suppliers used the picketed entrances, the Board rejected petitioner's contention that appeals solely to the consuming public were intended. The Board found that petitioner sought to achieve its objective, at least in part, through inducement and encouragement of employees of neutral employers to refuse to handle merchandise or to perform services for their employers. A majority of the Board further found that Associated and the retail stores were separate legal entities conducting a normal business relationship, and that the temporary assistance afforded Associated by a few storeowners during the first week of the strike long before the picketing began did not constitute such an alliance as would warrant direct picketing of the retail

stores. The Board concluded that the retail stores were neutral employers which Section 8(b)(4)(A) is designed to protect (R. 73–77). Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found and to post appropriate notices (R. 78–80).

The court of appeals held that the record adequately supported the findings and inferences of the Board and, with a modification not relevant here, enforced the Board's order (Pet. 25–36).

ARGUMENT

1. Section 8(b)(4)(A) of the Act prohibits the inducement of employees of any employer to engage in a strike or concerted refusal to handle goods or perform services in the course of their employment where an object thereof is to force any employer to cease doing business with another. There is no controversy here that in picketing the retail stores, petitioner Union sought to bring about a cessation of business between the stores and Associated. The critical issue therefore is whether the Union sought to accomplish this objective solely by inducement of the public to discontinue its patronage of the stores (in which case Section 8(b)(4)(A) would be inapplicable) or whether it also intended, at least in part, to reach the employees of the stores and the employees of their suppliers and induce them to refuse to handle goods or perform services in the course of their employment for the proscribed object (in which case Section 8(b)(4)(A) does apply). The Board found that the latter was the case.

The issue here thus narrows to whether the Board could reasonably infer, as it did, from all the surrounding circumstances, that the Union's picketing of the store entrances used by the public and employees, although ostensibly directed to the former, nevertheless was intended to encompass something more than a mere appeal to the consuming public, *i.e.*, to reach the employees and induce them to give sympathetic support and assistance to the Union in its dispute with Associated. The court below held that on the record in this case the Board was entitled to draw such an inference. Essentially, therefore, the question which the case presents is of a factual nature going to the substantiality of the evidence supporting the Board's inference. The resolution of that question adversely to petitioner presents no issue warranting further review by this Court.[4]

In any event, the record adequately supports the Board's inference. As noted above, the Union decided to institute a picket line at the stores some two months after the strike at Associated began. During that interval the Union had publicized its cause, and sought to enlist public support, through newspaper advertisements and the distribution of handbills to the public at the store entrances. It was only after the response of the consuming public apparently proved ineffective to effectuate the Union's purpose that the Union began picketing at the store entrances

[4] The foregoing analysis makes clear, we think, that there is no basis for petitioner's claim (Pet. 9) that "both the Board and the court below have held that the purest consumer picketing is *per se* interdicted by Section 8(b)(4)(A) * * *."

which were used both by the public and employees. In establishing a picket line at entrances where the employees would have to cross it in order to perform their employment tasks, it is not unreasonable to conclude that the Union acted with an awareness of the "notorious" "reluctance of workers to cross a picket line" (*Printing Specialties and Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (C.A. 9), certiorari dismissed, 336 U.S. 949) and with the purpose to take advantage of this "reluctance." If the Union's sole purpose had been to appeal to the public for a consumer boycott, that purpose had been, and could have continued to be, served by the newspaper advertisements and the distribution of handbills at the store entrances. In these circumstances, there is legitimate basis for the inference drawn by the Board that the picketing was, at least in part, intended to enlist the aid of neutral employees and was therefore unlawful.[5]

The ruling below is not in conflict with the decisions of the Second Circuit cited and relied on by petitioner (Pet. 12–14). In those cases, that court found that "in the particular context in which the picketing

[5] This inference is not negated by the circumstance that petitioner may have also intended to fortify its consumer appeal. The legality of one objective does not excuse the illegality of the other. Cf. *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 904, 907 (C.A. 2), certiorari denied, 351 U.S. 962. Nor is the inference precluded by the further circumstance that the picket sign appeals were ostensibly addressed to the public. While this is a factor to be taken into account, such self-serving declarations obviously cannot be decisive. The purpose of the picketing must be determined from a consideration of all the surrounding circumstances.

[took] place" there was no evidentiary basis for an inference that the picketing was intended to induce employees to engage in work stoppages. *National Labor Relations Board* v. *Local 50, Bakery and Confectionery Workers International Union*, 245 F. 2d 542, 548; to the same effect, *National Labor Relations Board* v. *Business Machine and Office Appliance Mechanics Conference Board*, 228 F. 2d 553, 560, certiorari denied, 351 U.S. 962. Cf. *National Labor Relations Board* v. *Associated Musicians, supra.* Here, the court below has concluded that a basis for that inference was present in the record. The difference is attributable not to a conflict in principle but to the differing circumstances of each case.

2. Equally insubstantial for purposes of certiorari is petitioner's further contention (Pet. 11–13) that Associated and the stores constitute a single employer for purposes of Section 8(b)(4)(A), and hence the extension of the picket line to the stores was not, in any event, violative of that Section. The record shows that Associated is a separate corporate entity with its own assets, directors, officers, and employees. The 370 retail store stockholders of Associated operate independently-owned retail stores over which Associated exercises no control. Although the retail stores, as stockholders of Associated, elect the latter's directors, this power gives the stores only potential control over Associated. Actual control is exercised by the directors who are vested with "complete control and management" of Associated's affairs, are empowered to pass upon prospective purchasers of stock, and are

even empowered to revoke sales of stock already made. Under these circumstances, where at most the retailers had only potential control over the affairs of Associated and there is no evidence that any actual control was exercised, the relationship between Associated and the retail store stockholders is plainly insufficient to constitute them a single entity for purposes of Section 8(b)(4)(A). A more realistic view is to regard Associated as a large corporation which is engaged in the wholesale grocery business and which maintains a "normal business relationship" with its retail customers. The finding of the Board, affirmed by the court below, that that relationship was within the purview of Section 8(b)(4)(A) is plainly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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